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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

L.D. JAMESON,
Petitioner,
vs.

BETHLEHEM STEEL CORPORATION
THE PENSION PLAN OF BETHLEHEM
STEEL CORPORATION AND
SUBSIDIARY COMPANIES, ALSO
KNOWN AS BETHLEHEM 1977
SALARY PENSION PLAN AND THE
GENERAL PENSION BOARD,
BETHLEHEM STEEL CORPORATION
AND SUBSIDIARY COMPANIES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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I. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

A. Did the court of appeals err in affirming the grant of summary judgment in favor of respondents on the grounds

that the severance policy in effect in 1970 was a plan under the Employee Retirement Income Security Act ("ERISA"), the terms of which had been correctly applied when petitioner's request for pension credit for his years of employment in Venezuela was denied?

B. In the alternative, if the reasoning of the court of appeals was erroneous, was the grant of summary judgment nonetheless appropriate, because under the terms of the 1977 Bethlehem Pension Plan, petitioner had incurred a "break in service" when he retained severance monies at the time of the termination of his employment in Venezuela?

II. COUNTERSTATEMENT OF THE CASE

L. D. Jameson, plaintiff/petitioner, filed this action on December 14, 1983, in the United States District Court

for the Eastern District of Pennsylvania. The complaint alleges that defendant/ respondents, Bethlehem Steel Corporation ("Bethlehem" or the "Corporation") the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies (the "Pension Plan" or "Plan") and the General Pension Board of Bethlehem Steel Corporation and Subsidiary Companies ("Pension Board") violated the nonforfeitability provision of the Employee Retirement Income Security Act ("ERISA"), Section 203(a)(2)(A), 29 U.S.C. §1053(a)(2)(A), by refusing to credit plaintiff with years of service earned by him while he was employed from May, 1953 until February, 1970 by the Iron Mines Company of Venezuela ("IMCOV"), a wholly-owned subsidiary of Bethlehem Steel Corporation.

At the time of the termination of Mr. Jameson's employment by IMCOV in 1970, Bethlehem paid him "Cesantia" and/or "Antiquedades" ("C&A"), a form of severance or separation pay provided for under Venezuela law, in the sum of $56,492.00.[1/] In 1970, Bethlehem's policy regarding the payment of C&A was that recipients who were hired by other Bethlehem companies after their termination in Venezuela had the option of either retaining the C&A payment and incurring a break in "continuous service", or returning the C&A payment to the company and retaining, for pension and

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1. Contrary to petitioner's claim, there is nothing in the record of this case other than his bold assertion which indicates that Mr. Jameson's receipt of the "C&A" was "...a vested right which cannot be waived under any circumstances." (Petition at p. 4)

other purposes, credit for their years of service in Venezuela. (Respondents' Appendix at A-4, A-13, A-14, A-24-A-26). Mr. Jameson was admittedly aware of the policy which, as manager of the Venezuelan operation, he was responsible for applying, and he elected to keep the payment of $56,492.00. (Petition at p.5)

Therefore, when Mr. Jameson was rehired by Bethlehem Mines Corporation ("Bethlehem Mines"), also a subsidiary of Bethlehem, consistent with the then existing policy and practice of the Corporation in 1970, he was characterized as a "new employee" for pension purposes. He worked for Bethlehem Mines in Spain from March 1, 1970 until May 31, 1975. From June 1, 1975 until February, 1979, he was actively employed by Bethlehem and was stationed primarily in Sierra Leone.

In February, 1979, plaintiff announced his intention to resign from Bethlehem. He negotiated the terms of his separation, which were memorialized in a written agreement dated March 23, 1979. (Respondents' Appendix at A-15 - A-24). The agreement provided, *inter alia*, that he would have ten years of credited pension service as of 1980. (Respondents' Appendix at A-21). In order for him to accrue the ten years of service which were necessary if he were to be eligible for pension benefits, Bethlehem agreed to continue Mr. Jameson in its employ from March 1, 1979 through February 29, 1980, at half of his regular salary. During this period, Mr. Jameson was only a nominal employee; he did not report to work. (Respondents' Appendix at A-19). Under the terms of the

agreement, plaintiff formally resigned from Bethlehem on February 29, 1980. (Respondents' Appendix at A-19).

It was only because Bethlehem allowed Mr. Jameson to continue as a nominal employee for the year from March 1, 1979 until February 29, 1980, that he qualified for a deferred vested pension under the Pension Plan, based on his years of service with Bethlehem Mines Corporation and with Bethlehem from March 1, 1970 through February 29, 1980. He has the option of electing full pension benefits at age 65 or of electing a reduced pension benefit at any time after age 60. He is now over 60 years of age and has not requested his pension.

Instead, Mr. Jameson has requested the Secretary and Plan Administrator to credit his years of service

with IMCOV in Venezuela. In a letter dated June 12, 1980, David Kempken, the Secretary of defendant Pension Board, wrote Russell S. Johnson, Esquire, an attorney for plaintiff, explaining that Mr. Jameson was not entitled to credit for his years of service in Venezuela because he had retained the C&A payment, which, in 1970, resulted in a break in his "continuous service" for pension purposes. (Respondents' Appendix at A-24 - A-26). The Pension Board reviewed and upheld the denial of pension credit for Jameson's years of employment in Venezuela.

The decision by the Plan Administrator and the Plan Trustees was based on language found in Section 5, entitled "Determination of Continuous Service," of the "Bethlehem 1977 Salaried Pension

Plan." Eligibility for and the amount of a participant's pension are determined on the basis of years of "continuous service." Under §5.1, the period of continuous service is:

> calculated from the employee's last hiring date (this means in the case of a break in continuous service, continuous service shall be calculated from the date of reemployment following the last unremoved break in the continuous service) in accordance with the following provisions; provided, however, that the last hiring date prior to the effective date of this plan <u>shall be based on the practices in effect at the time the break occurred</u>.... (emphasis added). (Respondents' Appendix at A-7 - A-8).

Mr. Kempken determined that Mr. Jameson was not entitled to credit for the years of his employment in Venezuela because, in 1970, the policy in effect when he left the employ of IMCOV was that if a person retained the C&A payment,

there would be a break in his service with Bethlehem for purposes of pension credit. (Respondents' Appendix at A-24 - A-26).

The record in this case contains a letter dated January 27, 1967 from G.C. Vary, then Secretary of the General Pension Board, to E.P. Leach, a Vice President at IMCOV. (Respondents' Appendix at A-4 - A-5). The letter explained that any IMCOV employee who was terminated and immediately rehired at another Bethlehem operation would receive the payment of C&A as a "payoff" for his years of service in Venezuela. Unless he repaid that money to the Company, he would begin at the other Bethlehem operation as a new employee. The letter also explained that this practice "parallels the handling of severance allowance

payments to employees who are terminated from one Bethlehem operation in the states and are subsequently rehired at that or another state-side Bethlehem operation."

Because Mr. Jameson was the Manager of Operations at IMCOV, he was notified of this practice in a September 6, 1966 memorandum, addressed to him. (Respondents' Appendix at A-13 - A-14). In 1970, when his position with IMCOV terminated, he was again informed of the policy. A February 24, 1970 memorandum initialed by Mr. Jameson and found in his personnel file includes this remark: "[w]hat is the deadline for me to decide whether I want to receive my severance pay and give up my Venezuelan service for retirement?" (Respondents' Appendix at A-14). Indeed, Mr. Jameson does not

dispute that he knew at the time he terminated his employment with IMCOV that, if he chose to keep the C&A payment, he would lose credit for his years of service in Venezuela. (Petition at p.5).

III. SUMMARY OF ARGUMENT

This Court should decline to exercise its discretion to review the grant of summary judgment in favor of the respondents and against the petitioner.

Despite petitioner's argument to the contrary, the dearth of case law on the subject, noted by petitioner himself, belies his contention that the issue raised by this case, i.e., the proper interpretation of 29 U.S.C. §1053(b)(1)(F), presents "significant and recurring problems."

An additional reason for denying the Writ in this case is that the

lower courts correctly applied the law and reached a just and fair determination.

IV. REASONS FOR DENYING THE WRIT

A. THE ISSUES RAISED BY THIS CASE DO NOT WARRANT REVIEW BY THE SUPREME COURT.

The provisions of ERISA at issue in this cause regard the nonforfeitability requirements of the Act. Section 203(b), 29 U.S.C. §1053(b), requires that, subject to a few limited exceptions, all of an employee's years of service with an employer must be credited in determining his pension eligibility. Years of service accrued before the effective date of ERISA (January 1, 1975) may be disregarded "...if such service would have been disregarded under the rules of the plan with regard to breaks

in service, as in effect on the applicable date...." 29 U.S.C. §1053(b)(1)(F). Petitioner argues that certiorari should be granted to review this case because of "significant and recurring problems" of interpreting this provision, §1053(b)(1)(F).

Petitioner, however, cites only three decisions in support of this claim. The paucity of published decisions involving this issue suggests that it is not of pressing importance. Also, a review of the decisions cited by petitioner shows that the analyses used by the courts are not incompatible but rather reflect the differing factual circumstances of the cases.

In Snyder v. Titus, 513 F.Supp. 926 (E.D. Va. 1981), trustees of a union pension plan sued a pensioner, seeking

repayment of benefits allegedly improperly paid to him. Relying upon the terms of a 1959 plan, the trustees claimed that, because of "breaks in service" in 1954, 1955, 1956 and 1958, the pensioner was not eligible for benefits.

The defendant applied for pension benefits on May 1, 1978, claiming that he had at least 25 years of credited service. The trustees ultimately decided that he was ineligible because of the break-in-service rule contained in the 1959 pension plan; that is, he had not worked in covered employment for more than 250 hours in any quarter during the years 1954, 1955, 1956 and 1958. The subsequent revisions of the plan did not contain any language referring to a pre-1959 break in service. The 1976 plan, which was in effect at the time he

applied for his pension, explicitly defined a break in service as the failure to earn any future service credits for three consecutive plan years after July 1, 1958.

Holding that the plan in effect at the time application for pension benefits is made should apply, the Snyder court found that the trustees' use of the 1959 rules was arbitrary and capricious and must be reversed. Because the 1976 plan defined a break in service as the failure to earn any future service credits for three consecutive plan years after July 1, 1958, the court determined that pre-1959 breaks in service had been defined out of existence by the 1976 plan. The terms of the pension plan at issue in Snyder therefore differ markedly from those found in the 1977 plan in this

case, which require that calculation of "...the last hiring date prior to the effective date of this plan shall be based on the practices in effect at the time the break occurred...." (Respondents' Appendix at A-8).

The Snyder court also found that there was nothing in the language of 29 U.S.C. §1053(b)(1)(F) or in the legislative history of ERISA prohibiting a plan from expressly providing that a break in service occurring before the effective date of ERISA shall be governed by the rules in effect at the time of the break. However, since the plan in question did not refer to other rules as governing a particular period of employment, the court in Snyder held that the trustees could not, under §1053(b)(1)(F), deny the defendant his pension based on

the 1959 break-in-service rule. Because the 1977 plan in the instant case does contain a reference to earlier practices for determining the last date of hiring, the holding of Snyder does not conflict with the reasoning of the two lower courts in this case.

Like the Snyder decision, Govoni v. Bricklayers, Masons and Plasterers International Union, 573 F.Supp 82 (D. Mass. 1983), aff'd 732 F.2d 250 (1st Cir. 1984), can be harmonized with the decisions of both the court of appeals and the district court in this case. Plaintiff Govoni sued, alleging that the trustees of his union pension plan had violated the nonforfeitability clause of ERISA, 29 U.S.C. §1053, in their refusal to credit certain years of plaintiff's employment, based on terms of the 1962

version of the pension plan. Govoni argued that defendants should have used the pension plan rules in effect in 1979 when he made his application for pension, and under the terms of that plan, he had not incurred a "break in service."

While the district court held that the pension plan in effect at the time an employee applies for his pension or his application is ruled upon is the controlling plan, it nonetheless affirmed the denial of pension credits for Govoni's employment before 1965.

The 1976 plan, which was in effect in 1979, contained a significant ambiguity. The first paragraph stated that a "break in service" may occur "on or after June 1, 1962" provided that the conditions of both subparagraphs (a) and (b) are satisfied. However, subparagraph

(b) included a condition that could not be satisfied until after August 1, 1976. Despite this ambiguity, the district court found that the trustees' interpretation of the plan was reasonable. They treated the phrase "commencing August 1, 1976" as the effective date of subsection (b) and that any break in service prior to that date could occur upon satisfaction of subsection (a) by itself. The record in the case showed that the provision regarding the "rule of parity" found in subsection (b) had been included in the 1976 plan for the sole purpose of complying with ERISA and was intended to have only prospective effect.

Other factors which convinced the court of the reasonableness of the trustees' interpretation included the fact that the trustees had applied the

1962 rule in a consistent and uniform manner and that during the period from June 1, 1962 until August 1, 1976 publications describing the break-in-service rule were distributed to participants and plaintiff knew or should have known about the rule when he resumed covered employment in 1966. The Govoni court also found that the trustees' interpretation did not violate the substantive provisions of ERISA because 29 U.S.C. §1053(b)(1)(F) expressly permits pension plans to adopt a dual break-in-service scheme: one which will apply to breaks in service after the effective date of ERISA and one which permits the old rules to apply to breaks occurring before the effective date of ERISA.

The third case cited by petitioner for the proposition that this

court should grant certiorari because of significant and recurring problems of interpretation of 29 U.S.C. §1053(b)(1)(F) is Tanzillo v. Local Union 617 International Brotherhood of Teamsters, 769 F.2d 140 (3d Cir. 1985). The decision in Tanzillo, however, is not inconsistent with the decision in this case.

Mr. Tanzillo worked for a company called Aero Transportation for sixteen years. For two of those years, his employer was required to make pension plan contributions to the union fund; however, it never actually made those contributions. Thereafter, he worked for another company which contributed to another pension plan which was recognized by the union for reciprocity purposes. When Tanzillo applied for pension benefits in 1979, the trustees denied him

credit for 19 quarters because he had suffered a "break in service," as defined in the 1962 plan which was in effect at the time Tanzillo worked for Aero. Mr. Tanzillo argued that he had not suffered a break in service under the terms of the 1978 plan, which was in effect at the time he filed his claim for pension benefits.

The Court of Appeals found that the 1978 plan did apply; however, since it provided that the applicable break-in-service rule was the one in effect at the time the break occurred, the rules of the earlier plan controlled.[2/] The Third

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2. The 1978 plan in the Tanzillo case provided that pension eligibility "shall be determined under the terms of the plan...in effect at the time

[Footnote continued on next page]

Circuit affirmed the decision of the pension board denying Mr. Tanzillo credit for 19 quarters because, under the terms of the 1962 plan, he had incurred a break in service in 1961. As that court pointed out in its opinion in this case, the Tanzillo court was not concerned with which plan applied since the plan in effect at retirement referred back to the earlier plan when considering events prior to the effective date of the later plan. (Petition at p.42)

[Footnote 2 continued from previous page]

the participant separates from covered employment." This clause is similar to the one found in the 1977 Bethlehem salary pension plan which states that a break in continuous service which occurs prior to the effective date of the plan "shall be based on the practices in effect at the time the break occurred...."

These decisions do not support petitioner's contention that certiorari should be granted because of "significant and recurring" problems in interpreting 29 U.S.C. §1053(b)(1)(F). Each of these cases presented different factual circumstances, and any differences in the courts' analyses can be explained on that basis. Certainly, any differences between the reasoning used by the courts in those opinions and that employed by the court of appeals and the district court in this case are not significant enough to warrant review of this case by the United States Supreme Court.

B. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW THIS CASE AS THE LOWER COURTS CORRECTLY APPLIED THE LAW.

The crucial issue in this case is whether the lower courts properly

granted summary judgment in favor of defendant/respondents on the basis that the Plan Administrator and Trustees did not act arbitrarily or capriciously in denying petitioner pension credit for his years of service in Venezuela. A review of the record and the applicable law shows that both the district court and the court of appeals, albeit by different analyses, reached the correct determination.

The United States Court of Appeals for the Third Circuit affirmed the district court's grant of summary judgment in favor of respondents but on a different theory than was employed by the lower court. The court of appeals noted that under 29 U.S.C. §1053(b)(1)(F) an employer may disregard years of service accrued before the effective date of

ERISA (January 1, 1975) if those years would have been disregarded under "the rules of the plan with regard to breaks in service, as in effect on the applicable date." The court looked first at the 1968 pension plan, which was in effect at Bethlehem when Mr. Jameson incurred his break in service in 1970 by choosing to retain the C&A monies. That plan provided that pension benefits would accrue during "continuous service" but did not define either continuous service or a break in service. The Third Circuit did note, however, that, even if it were to accept petitioner's argument that the 1977 plan controlled, since the 1977 plan refers to prior practices for prior events, the 1968 plan controls whether one begins the analysis with the 1968

plan or the 1977 plan. (3d Cir. Slip Op. at ¶12, Petition at p. 42)

According to the court of appeals, the crucial issue was whether the policy in effect at Bethlehem in 1970 regarding retention of the C&A money was part of the "plan in effect," as referred to in section 203(b)(1)(F), even though it was not part of the 1968 written pension plan. Since a pension plan is defined under ERISA as "any plan, fund or program" established to provide retirement income, the Third Circuit held that Bethlehem's severance policy which gave an employee the choice of either being paid the C&A at the time of his transfer or at retirement was a program providing retirement income within the meaning of the statute. The court of appeals held that the trustees had correctly applied

the 1970 plan and properly denied Mr. Jameson pension credits for his years of employment in Venezuela.

The district judge reached the same conclusion but by a different path. In his view, the starting point for any analysis was the plan in effect at the time Mr. Jameson filed his pension claim in 1980, which was the 1977 plan. The district court then looked at §5.1 of that plan which states that continuous service is measured from the employee's last hiring date to the date of his retirement. It contains, however, a proviso that "...the last hiring date prior to the effective date of this plan shall be based on the practices in effect at the time the break occurred." Because the 1977 plan required that practices in effect at the time of the break should be

applied and because there was no question that plaintiff knew about the policy pertaining to the C&A payments, the district court found that the pension board's determination that Mr. Jameson had incurred a break in service in 1970 was neither arbitrary nor capricious and therefore must be upheld.

The district judge rejected plaintiff's argument that since the C&A policy was not specifically included in the written plan document of either 1977 or 1968, it could not be used as a basis for denying pension benefits to plaintiff. The court reasoned that ERISA's requirement, found in section 402, that all terms and policies governing pension plans be in writing cannot be used to analyze the legality of pension plans in

effect before the effective date of ERISA.

Nonetheless, the petitioner argues:

> The legislative history of ERISA and the Congressional policy which led to the enactment of the act readily demonstrate that Congress intended to recognize only break-in-service rules which had been written in the pre-ERISA plan, and to disregard any unwritten policies or practices which were unknown to the IRS and contrary to IRS rules. (Petition at p. 11)

Petitioner does not cite any authority for this assertion. Earlier in his petition he quotes the following sentence from the House Conference Report, part of the legislative history of ERISA:

> Generally, the vesting rules of the conference substitute are to apply to all accrued benefits, including those which accrued before the effective date of the provisions (subject, however, to the break-in-service rules discussed below).

(Petition at p. 6-7). This is, of course, an insufficient basis for claiming that Congress intended that pre-ERISA pension plans comply with the substantive requirements of the Act.

This argument also conflicts with section 514 of ERISA, 29 U.S.C. §1144(b)(1), which states that ERISA "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." In an earlier decision in this case, the Third Circuit observed that section 514 mandates that "ERISA's substantive provisions are not to be used to determine the law at the time of the incident occurring before January 1, 1975." Jameson v. Bethlehem Steel Corporation, 765 F.2d 49, 62 (3d Cir. 1985) Similarly, in Berry v. Cadence Industries

Corporation, 555 F.Supp. 1284, 1289 (E.D. Pa. 1982), the district court observed that by including the provision of §1144 in ERISA:

> "...Congress meant to prevent the past conduct of pension plan fiduciaries and contributors from being judged retroactively under the standards established by ERISA simply because the conduct generated consequences subsequent to ERISA's effective date."

Prior to the effective date of ERISA, January 1, 1975, there was no legal requirement that provisions of a pension policy be contained in a written instrument. Therefore, petitioner's unsupported claim that Congress intended that the exception set forth in §1053(b)(1)(F), allowing forfeiture of pension credits under certain circumstances, only applied to pension rules or policies contained in written plans is without merit.

V. CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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January 8, 1987
DATE

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STATEMENT OF RESPONDENT BETHLEHEM STEEL CORPORATION AS REQUIRED BY SUPREME COURT RULE 28.1

Pursuant to Rule 28.1: All of the parties to this Petition are listed in the caption. Bethlehem Steel Corporation has no parent. Its shares are publicly traded. Virtually all of its subsidiaries are either wholly owned directly by it or indirectly through its subsidiaries. None of its subsidiaries or other enterprises in which Bethlehem Steel Corporation owns an interest is known to have publicly traded securities.

PROOF OF SERVICE

DONA S. KAHN, ESQUIRE, on oath deposes and states that on the 9th day of January, 1987, three copies of the Brief of Respondents in Opposition to the Petition for Certiorari and three copies of the Appendix to the Brief of Respondents in Opposition to the Petition for Certiorari were served by first class mail, postage prepaid, on petitioner's attorney, John R. Vintilla, Esquire, 150 Plaza West Building, 20220 Center Ridge Road, Cleveland, Ohio 44116 by U.S. First Class Mail, and that all parties required to be served have been served.

Dona S Kahn

DONA S. KAHN, ESQUIRE
ALISON PEASE, ESQUIRE
Attorneys for Respondents
Bethlehem Steel Corporation, et al.

SUBSCRIBED AND SWORN TO before me this 9th day of January, 1987.

Michelle Todd Gulick
NOTARY PUBLIC

MICHELLE TODD GULICK
Notary Public, Phila., Phila. Co.
My Commission Expires May 22, 1989